In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1316

THE RENEGOTIATION BOARD, PETITIONER

v.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent argues (Resp. Br., p. 15) that the Regional Boards are "agencies" within the meaning of the Administrative Procedure Act and thus the FOI Act (whose reports are therefore final opinions), because they were created pursuant to 50 U.S.C. App. 1217(d), which empowers the Board to "delegate in whole or in part any function, power, or duty * * * to any agency of the Government, including any such agency established by the Board * * *." However, the use of the term "agency" (or the failure to use it) in the Board's organic statute is not controlling. Whether an office is an "agency" for the purpose of the APA depends on its powers and functions. An authority, even an authority within an agency, may itself be an "agency" for the purposes of the APA (and the FOI Act), if, *but only if,* it has power "to take final and binding action * * *." Administrative Procedure Act, Legislative History, Senate Committee on the Judiciary, 79th Cong., 2d Sess., p.13.

As we demonstrated in our main brief, Br., pp. 38-40, the Regional Boards possess no independent powers of decision in the type of case at issue here. Indeed, the regulation in effect at the time the action was commenced (and presently) so states, 32 C.F.R. 1471.2(b)(1972);[1] see 17 Fed. Reg. 1401 (1952), para. 3(c), (reprinted as an appendix to the Brief for the Respondent at p. 2A), and the district court so found. Pet. App. A, p. 29A. Thus, the Regional Boards are not "agencies" (whose recommendations constitute final opinions), but are units within the agency to whom the agency has delegated certain preliminary tasks. Their reports therefore constitute recommendations made by subordinates which, as the district court also found (Pet. App. A, p. 31A), the agency studies or considers but does not adopt.

That such subdivisions of an agency are not themselves "agencies" for the purposes of the FOI Act is confirmed by recent amendments to that Act.[2] In Section 3 of Pub. L. 93-502, 88 Stat. 1564, Congress amended the definition of "agency" in the Administrative Procedure Act so that, for purposes of the FOI Act, the term now includes such entities as the United States Postal Service, the Postal Rate Commission, and certain government corporations or government-controlled corporations. However, as the conferees on the bill which became Pub. L. 93-502 explained:

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[1]Respondent relies upon a regulation, 32 C.F.R. 1473.2(a)(1968), which refers to a "determination" of the Regional Board. But, given the explicit regulation which states that no decisional authority has been delegated to the Regional Boards, 32 C.F.R. 1471.2(b)(1972), the term "determination" cannot be read to mean "final decision."

[2]The amendments are effective 90 days from date of enactment (November 21, 1974). Pub. L. 93-502, 88 Stat. 1564.

> Expansion of the definition of "agency" [by the amendment] * * * is intended to broaden applicability of the Freedom of Information Act but it is not intended that the term "agency" be applied to subdivisions, offices or units within an agency. [S. Rep. No. 93-1200, 93d Cong., 2d Sess., p. 15]

By means of this amendment, Congress extended the number of governmental agencies to which the FOI Act applies. However, in so doing, it again made clear that it did not intend, and never did intend, the FOI Act to apply independently to subordinate advisory subdivisions of an agency, such as the Regional Boards.[3]

2. Respondent contends, alternatively (Resp. Br., p. 19), that regional board reports are "final opinions" of the statutory Board. Respondent suggests that, where the Board does not give a matter "in-depth consideration" by assigning it to a division, the Board implicitly adopts the regional board reports as the Board's "final opinion" (*ibid.*).

This contention is contrary to the explicit finding of the district court that the Board does not adopt the reports and recommendation of the Regional Boards (Pet. App. A, p. 31A), as well as the only evidence in the record. See, *e.g.*, App. 77. Moreover, the suggestion that "perfunctory review" results in the adoption of a subordinate's recommendation as a superior's "final opinion" is untenable. As the Court of Appeals for the District of Columbia Circuit recently noted, *Washington Research Project, Inc.* v. *Department of Health, Education and Welfare,* No. 74-1027, decided September 12, 1974, slip op., p. 16, petition for a writ of certiorari pending, No. 74-736, if the nature of the review accorded a subordinate's recommendation were relevant, the courts would become involved

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[3]Respondent contends (Resp. Br., p. 2) that "Summaries of Facts and Reasons" were not made public until "after this case was decided on remand by the district court [on April 26, 1971]." On February 27, 1971, the Board amended 32 C.F.R. 1480.5 to make such documents publicly available. 36 Fed. Reg. 3808; see also App. 206.

> * * * in determining the care with which decisional officers of government agencies supervise their staffs, in order to determine whether in fact the staff is not the stand-in for the officer or agency—its recommendations his decisions—and whether it ought not therefore in law to be held accountable as the agency. This * * * [the courts] cannot do. *Morgan* v. *United States,* 304 U.S. 1, 18 (1938); *United States* v. *Morgan*, 313 U.S. 409, 422 (1941).

3. In arguing that division and regional board reports are final opinions, respondent invokes the spectre of "secret law" (Resp. Br., pp. 24-25, 31). But the mere fact that these reports are undisclosed does not make them secret law. Nothing in the record of the case supports the suggestion that these documents articulate general principles to guide future agency action. Indeed respondent's accurate characterization of the documents as "the Board's evaluation of a contractor's performance under statutory factors" (Resp. Br., p. 23) shows that no "secret law" is being developed.[4] Moreover, since the Board does not adopt the reasoning of the reports (App. 79, 81), it can not constitute "secret law."

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[4]Respondent relies, Resp. Br., pp. 24-25, upon *Sterling Drug, Inc.* v. *Federal Trade Commission,* 450 F.2d 698 (C.A.D.C.). However, the court there held that staff memoranda submitted to Commissioners of the Federal Trade Commission were exempt from compelled disclosure pursuant to Exemption 5, 450 F.2d at 706-707, even though the Commission did not issue an opinion to which the memoranda related.

In addition, the court in *Sterling Drug* held that memoranda written by some of the Commissioners to the other Commissioners were also exempt from compelled disclosure pursuant to Exemption 5, in view of the need to preserve "the full flow of ideas between Commissioners." 450 F.2d at 708. The same considerations apply here. See Board Br., pp. 24-29.

Respondent attempts (Resp. Br., p. 26) to distinguish this latter holding in *Sterling Drug,* by contending that there, unlike the present case, the memoranda written by the Commissioners did not "necessarily contain a full and accurate account of the grounds for the decision." 450 F.2d at 707. But here also, as the record demonstrates, division reports do not reflect the reasons for the Board's decision. App. 79, 180.

Respondent seizes upon our reference to "shared perceptions" and "common understandings" (Board Br., p. 28) as showing that principles are being developed in secret (Resp. Br., p. 28). However, we used these terms not in the sense that disclosure of the reports would reveal bases for the Board's decisions which are not generally known, but that disclosure would reveal documents which are incomplete when viewed in terms of the ability of persons other than members of the Board to comprehend them.[4]

4. Respondent contends (Resp. Br., p. 26) that division reports are not inter-agency memoranda within exemption 5 because they "are prepared by members of the Board as a part of the decision-making process and thus reflect the views of the author in his or her decision-making capacity." However, as members of the judiciary well know, not every analysis prepared by a member of a collegiate decision-making body is designed to explain the decision which has been reached (or reasons for concurrence in or dissent from the decision). Memoranda may also be pre-

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[4]A recent decision of the Court of Appeals for the District of Columbia Circuit, *Washington Research Project, Inc.* v. *Department of Health, Education and Welfare, supra,* illustrates this point.

In that case, the court considered the applicability of Exemption 5 to certain summaries of research designs prepared by employees of the Department of Health, Education and Welfare addressed to others within the same Department. The court noted that the sample summary before it stated that the proposed research design utilized certain rating scales. These rating scales were enumerated but were neither identified nor described. Slip op., at p. 22. The summary, according to the court, merely states that the scales were said to have proved "sensitive in prior, unspecified studies." *Ibid.* Since the author and the addressee possessed "common understandings" and "shared perceptions," there was no need to describe the scales further. Had the report been designed to explain a decision to the general public, however, there may have been a need to describe the scales in detail and to discuss the studies which had proved their reliability.

pared in the course of the exchange of ideas, recommendations and positions which is an integral part of the decision-making process. These documents are tentative, exploratory, and consultative only.

As we demonstrated in our main brief, division reports are this type of memoranda. The only evidence in the record establishes that the division reports are considered by the Board members prior to decision as part of the preparation for decision but do not serve as the sole basis for decision. *E.g.*, App. 81, 180-181. The division reports are tentative, pre-decisional and consultative; they cannot be considered "final opinions."

5. Respondent argues that the regional board reports are not exempt under exemption 5, because they were ordered to be produced in *Lykes Bros. S.S. Co.* v. *United States*, Ct. Cl. No. 594-71 (Resp. Br. pp. 29-30). In that case, the plaintiff, in a proceeding to review *de novo* a Board determination of excessive profits, moved to require the Board to produce 12 documents, including a Report of Renegotiation or Clearance Notice Report. The trial commissioner denied the motion and plaintiff appealed to the Court of Claims.

The Court of Claims vacated the commissioner's order and remanded to him with directions to examine the documents *in camera* and order the production of any documents which were disclosable under

> the rules and principles announced in *Boeing Airplane Company* v. *Coggeshall*, 280 F. 2d 654 (D.C. Cir. 1960), or *Grumman Aircraft Engineer. Corp.* v. *Renegotiation Bd.*, 425 F.2d 578 (D.C. Cir. 1970), 325 F. Supp. 1146 (D.C. 1971).

As we have noted, the division and regional board reports would not be routinely available in discovery pursuant to *Boeing Airplane Co.* v. *Coggeshall, supra.* To the extent they were made available in *Lykes Bros. S.S. Co.* v. *United States, supra,* they were made available pursuant to the order of the Court of Claims, which in turn relied upon the district court opinion in this case (325 F. Supp. 1146), which the court of appeals affirmed and which is now before this Court.

For the foregoing reasons, as well as the reasons set forth in our main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.